No. 75-212

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v

THOMAS W. DONOVAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 513 F. 2d 337. The opinion of the district court (Pet. App. 31a-58a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27a-28a) was entered on March 17, 1975. A petition for rehearing with suggestion for rehearing *en banc*

was denied on June 12, 1975 (Pet. App. 29a-30a). On July 2, 1975, Mr. Justice White extended the time within which to petition for a writ of certiorari to August 11, 1975. The petition was filed on August 8, 1975, and was granted on February 23, 1976 (App. 179). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2518(1)(b)(iv) requires the identification in an application to intercept telephone communications of all persons whom the government has probable cause to believe it will overhear participating in conversations about illegal activities.

2. Whether 18 U.S.C. 2518(8)(d) requires that the government advise the court of the identity of every person whose conversation has been overheard in the course of a wire interception so that the court may determine whether to require that such person be served with notice of the interception.

3. Whether, if the government violated the wire interception statute in this case, suppression of the evidence derived from the intercept is justified.

STATUTES INVOLVED

The relevant statutory provisions are set out in the Appendix to this brief, *infra*, pp. 1a-5a.

STATEMENT

On November 1, 1973, an indictment was returned in the United States District Court for the Northern District of Ohio charging Albert Kotoch, Joseph Anthony Spaganlo, the five respondents (Thomas W. Donovan, Vanis Ray Robbins, Dominic Ralph Buzzacco, Jacob Joseph Lauer, and Joseph Francis Merlo), and ten others with conspiracy to conduct and conducting an illegal gambling business, in violation of 18 U.S.C. 371 and 1955.[1] The indictment was returned after government agents had monitored two telephones of Kotoch and Spaganlo and two of George Florea[2] under court orders authorizing the interception of conversations relating to illegal gambling activities. Respondents were overheard talking about illegal gambling activities with persons using the Kotoch, Spaganlo and Florea telephones. The evidence obtained through these interceptions was suppressed by the courts below.

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[1] After granting the motions at issue here, the district court severed respondents from the remaining defendants for trial. Kotoch pleaded guilty to the substantive count, Spaganlo and another were convicted by the jury of conspiracy, the court dismissed the indictment as to one, and the others were acquitted. Spaganlo was sentenced to 5 years' imprisonment, the first six months of which is to be served in prison and the remainder on probation, and fined $10,000; Kotoch was placed on 3 years' probation and fined $7,500.

[2] George Florea was convicted of a gambling offense under a separate indictment.

The facts upon which the evidence was found to have been illegally obtained may be summarized as follows:

1. On November 28, 1972, the government submitted, pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-2520), an application for an order authorizing the interception of communications involving an illegal gambling business over two telephones listed under an alias of Joseph Anthony Spaganlo in North Olmstead, Ohio, at an apartment used by Albert Kotoch, and two telephones in Canton, Ohio, at the home of George M. Florea (App. 21, 28, 70). The application included an affidavit containing extensive, detailed information from six reliable sources engaged in gambling activities indicating that Kotoch, Spaganlo, and Florea were using these telephones to conduct an illegal bookmaking business, and that as part of that business they would place telephone calls and receive telephone calls from various persons, three of whom were identified by name in the application,[3] over the four telephones (App. 27-50). This information was corroborated by physical surveillance and by telephone company records, which showed extensive personal and telephonic communication among Kotoch, Spaganlo, Florea, and the three other named persons (App. 54-72). Telephone records also indicated that the telephones that were the subject of the application had been used to make

[3] Ernest Chickeno, Raymond Vara and Suzanne Veres.

numerous calls to known gambling figures both within and outside the State of Ohio (App. 63-72), including respondents Robbins and Buzzacco (App. 64-67).

Pursuant to this application and on the same date, Chief Judge Battisti of the United States District Court for the Northern District of Ohio issued an order authorizing the monitoring of the four specified telephones for a maximum of 15 days (App. 75). The order authorized special agents of the FBI to intercept gambling-related wire communications of Kotoch, Spaganlo, Florea, the three other named individuals, and others as yet unknown, to and from the four subject telephones (App. 76-77).[4]

During this interception, the government learned that respondents Donovan and Robbins were talking about illegal gambling activities with the subjects of the monitored telephones (Pet. App. 52a, 57a; App. 101-103, 176).[5]

[4] This original order, which is not in issue here, also provided that status reports were to be filed with the judge on the sixth and tenth days following the date of the order, showing what progress had been made and indicating whether continued interception was needed to discover the exact manner in which the named individuals and others, as yet unknown, participated in the illegal gambling business, the identities of their confederates, and the nature of the conspiracy involved (App. 77). Status reports were filed on December 4 and 8, 1972, and the monitoring was terminated on December 12, 1972 (App. 79, 83, 88).

[5] A person named "Buzz" or "Buzzer", who turned out to be respondent Buzzacco, was also overheard discussing gambling problems with several named targets (Pet. App. 12a);

On December 26, 1972, the government submitted an application for an extension of the original order to allow continued monitoring of the Kotoch-Spaganlo telephones (App. 87). At the same time, a separate application was submitted seeking authorization to monitor an additional telephone, the existence of which had previously been unknown, at the same location (App. 93). A new affidavit accompanied both applications and set forth the results of the previous period of monitoring, the manner in which the additional telephone had been discovered, facts indicating its use in the bookmaking business, and reasons why continued monitoring was necessary (App. 98-106).

On the same date, Judge Contie, also of the Northern District of Ohio, entered two orders granting the applications, one authorizing continued interception over the two telephones previously monitored and another authorizing interception over the newly-discovered telephone;[6] both orders allowed the interceptions of communications of Kotoch, Spaganlo, Florea, two named persons ("Chuck" and "Slyman"), and others

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in addition, calls to respondents Merlo and Lauer were intercepted as early as December 9, 1972 (Pet. App. 18a). None of these individuals was positively identified until after the application for the December 26 order was filed (Pet. App. 12a, 19a).

[6] These orders, although issued separately by the court, were essentially only an extension of the November 28 order; for purposes of clarity, the orders and their applications will be treated as such in this brief.

as yet unknown, concerning illegal gambling activities, for a maximum of 15 days (App. 108, 111).[7]

2. On February 21, 1973, the government submitted to the court a list of 37 names in a proposed order directing service of inventories giving notice of the interceptions. This list was thought to contain all the individuals who could be identified as having discussed gambling over the monitored telephones. Judge Battisti accepted and signed the proposed order, and an inventory notice was thereafter served upon all the persons listed. Respondents Donovan, Robbins, and Buzzacco were served notices pursuant to this order (App. 120-121). On September 11, 1973, the government moved for an order directing the service of inventory notice upon two additional persons, whose identities had been inadvertently omitted from the previous list (App. 124-128). The district court entered an amended order directing service of inventory notice on those two persons (App. 129). Through administrative oversight, respondents Merlo and Lauer were not included in either order and were not served with inventory notices.

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[7] The orders directed that the interceptions were to continue until communications were intercepted that revealed the exact manner in which the persons named and others unknown conducted the illegal gambling business, the identity of their confederates, and the nature of the conspiracy (App. 109-110, 112-113). Progress reports were filed, as required by the orders, on the third and tenth days following issuance of the orders (App. 110, 113, 114, 117). Monitoring terminated after only ten days, on January 4, 1973 (App. 119).

3. Respondents filed motions to suppress evidence derived from the wire interception, and an evidentiary hearing was held. After the hearing, Judge Krupansky, relying on the court of appeals' opinion in *United States* v. *Kahn*, 471 F. 2d 191 (C.A. 7), reversed, 415 U.S. 143, suppressed as to respondents Donovan, Buzzacco and Robbins evidence derived from the December 26 interception, on the ground that the failure to identify them by name in the applications and orders of that date violated 18 U.S.C. 2518(1)(b)(iv) and 2518(4)(a) (Pet. App. 52a-53a, 55a-57a). The district court also ruled that, although Merlo and Lauer were not known until after the December 26 application, evidence derived from both periods of interception was required to be suppressed as to them because they had not been served with inventories (Pet. App. 54a).

The government appealed, and the court of appeals affirmed. The panel was unanimous on the identification question (relating to respondents Donovan, Buzzacco and Robbins) but was divided on the notice question (relating to respondents Merlo and Lauer). On the identification question, the court relied on dictum in *United States* v. *Kahn*, 415 U.S. 143, 152, 155, and held that intercept applications and orders must identify all persons whose conversations relating to the criminal activity the government has probable cause to believe it will intercept.[8] After agree-

[8] In *United States* v. *Bernstein*, 509 F. 2d 996 (C.A. 4), petition for a writ of certiorari pending, No. 74-1486, the court

ing with the district court's finding that the government had such probable cause as to Donovan, Buzzacco and Robbins at the time of the December 26 application, the court affirmed the suppression of evidence against them derived from the interception order of that date (Pet. App. 7a-13a).

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reached the same conclusion, on the theory that a broad reading of the identification requirement "fosters conformity with both constitutional and statutory requirements. In particular, it is important to the exercise of (A) executive approval, (B) prior judicial authorization, and (C) subsequent judicial review of interceptions" (509 F.2d at 999-1000). See also *United States* v. *Moore*, 513 F. 2d 485, 493-494 (C.A. D.C.), relying on the *Kahn* dictum in interpreting 23 D.C. Code 547(a)(2)(D) (1973 ed.), which is substantially similar to 18 U.S.C. 2518(1)(b)(iv). The mandate in *Moore* has been recalled pending the disposition of our petition for a writ of certiorari in *Bernstein*. Two other courts have applied the *Kahn* dictum but found that the government did not have probable cause to believe the individual involved would be overheard. See *United States* v. *Russo*, 527 F. 2d 1051, 1056 (C.A. 10), petition for a writ of certiorari pending, No. 75-1218; *United States* v. *Chiarizio*, 525 F. 2d 289, 291-293 (C.A. 2). On the other hand, the Fifth and Eighth Circuits have held that the failure to name other known persons does not render the interception illegal in the absence of a showing of prejudice, assuming that the statute requires the naming of all known suspects, *United States* v. *Doolittle*, 507 F. 2d 1368 (C.A. 5), affirmed *en banc*, 518 F. 2d 500 (C.A. 5), petitions for writs of certiorari pending, Nos. 75-500, 75-509, 75-513; *United States* v. *Kilgore*, 518 F. 2d 496 (C.A. 5), petition for a writ of certiorari pending, No. 75-963; *United States* v. *Civella*, C.A. 8, Nos. 75-1522, 75-1525, 75-1528, 75-1530, 75-1532, decided April 16, 1976. Cf. *United States* v. *Kirk*, C.A. 8, Nos. 75-1359, 75-1364, 75-1365, 75-1386, 75-1429, 75-1449, 75-1542, decided April 22, 1976, suggesting that the statute requires only that the target be named.

On the notice question, the majority held that the government had an implied statutory duty to inform the issuing judge of the identities of Merlo and Lauer, so that the judge could determine whether discretionary notice should be served upon them. Because the government had, albeit perhaps inadvertently, failed to perform this duty, the court affirmed the district court's suppression of evidence against Merlo and Lauer derived from both periods of interception (Pet. App. 13a-17a).

The dissenting judge agreed with the majority's suppression of the evidence against Donovan, Robbins and Buzzacco. He further agreed that there was an implied statutory duty for the government to inform the issuing judge of the identities of all known parties to intercepted communications (Pet. App. 20a). However, he would have held that suppression is not appropriate for a violation of this implied duty in the absence of bad faith or prejudice, neither of which appeared to be present in this case. Accordingly, he would have vacated the suppression order as to Merlo and Lauer and remanded to the district court for further consideration (*id.* at 26a).

SUMMARY OF ARGUMENT

1. Sections 2518(1)(b)(iv) and 2518(4)(a) require that the application for and order authorizing a wire interception identify "the person, if known, committing the offense and whose communications are to be intercepted." We submit that these provisions require the naming only of the primary target

of an investigation—that is, the person whose telephone is to be subjected to surveillance.[9] This result follows not only from the plain language of the statute, but also from its structure, which demonstrates a congressional intent to protect privacy during an interception by minimizing excessive overhearing on the basis of the types of conversation to be overheard, rather than on the basis of the person conversing. The legislative history of the statute supports this interpretation, since it indicates that Congress did not intend Sections 2518(1)(b) and 2518(4) to impose particularization requirements more stringent than constitutionally necessary. Although Congress may have concluded that it was constitutionally necessary to name the primary target of the interception, it could scarcely have believed that the constitution required the naming of all persons likely to be overheard conversing about the offenses under investigation. Finally, there is no reason to believe Congress intended to impose a naming requirement that would significantly impede use of electronic surveillance in law enforcement but which would not safeguard legitimate privacy interests or protect against official abuses.

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[9] There will be situations in which the primary target is someone other than the listed subscriber of the telephone, as, for example, when a business telephone is used by a conspirator who is not the owner of the business, or when a conspirator regularly uses a friend's phone for illicit purposes. As a practical matter, there will rarely be any problem in defining the primary target in those situations.

2. Section 2518(8)(d) provides that "the issuing * * * judge shall cause to be served, on the persons named in the order * * * and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory." All the named parties, and all the parties the court ordered served, received inventories; there was no violation of the express requirements of statute. The court below incorrectly concluded that Section 2518(8)(d) implies an additional government duty to supply the issuing judge with the names of persons overheard. The purpose of the provision, to prevent secret interceptions, does not justify this inference, and a standard requiring the government to provide the judge with a comprehensive list of all identifiable persons overheard is unreasonable.

3. Even if the court below was correct in concluding that the government failed to comply with Sections 2518(1)(b)(iv) and 2518(8)(d), these failures do not warrant suppression of the evidence derived from the interception. Section 2518(10)(a) defines specifically the grounds justifying suppression; failures such as these are not included. In *United States* v. *Giordano*, 416 U.S. 505, 527, this Court interpreted Section 2518(10)(a)(i), the only arguably relevant provision, as embracing "statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." Neither the naming nor the inventory provisions serve

any such function. The explicit provisions of Section 2518(10) render the application of judicially created exclusionary rules inappropriate. In any event, the procedural errors involved here would be insufficient to merit suppression under those rules, since no substantial rights were affected and suppression would serve no useful deterrent purpose.

ARGUMENT

I

THE STATUTE DOES NOT REQUIRE THAT THE APPLICATION AND ORDER NAME EVERY PERSON WHOSE INCRIMINATING CONVERSATIONS THE GOVERNMENT HAS PROBABLE CAUSE TO BELIEVE WILL BE OVERHEARD

The district court found, and the court of appeals did not question, that the application and related documents in this case supported the district judges' findings of probable cause to issue the wire interception orders under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510-2520. The applications detailed facts supporting the conclusion that the individuals whose telephones were to be monitored and other named individuals were having conversations over the described telephones about illegal gambling activities. It follows that, had these named individuals been the only identifiable individuals whom the government had probable cause to expect to overhear conversing about illegal activities on these telephones, the order would

have authorized the interception of all gambling-related conversations over the monitored telephones. Such interceptions would have been authorized not only when the named persons were parties to the conversations, but also when others who had not been suspected of illegal activities spoke over the telephones. *United States* v. *Kahn*, 415 U.S. 143. But the courts below found that Section 2518(1)(b)(iv) prohibits the interception of any conversation of any person not named in the application, if at the time the application was filed the government had probable cause to expect to overhear that person participating in incriminating conversations over the monitored telephones.

The result of this construction of the statute is that persons suspected of wrongdoing before the interception, but not named, obtain a protection that persons not suspected do not get. Not only must overhearing of their innocent conversations be minimized, but their incriminating conversations must be suppressed. This interpretation of the statute serves no rational policy interest: it penalizes the government for careful pre-authorization investigation, while affording those suspected of illegal activities greater protections than those not previously suspected. As we detail below, this result is not supported by the literal language of the statute, the structure of Title III, or the congressional intent, nor are the onerous administrative burdens it would impose on law enforcement officials and the

courts justified by compensating benefits to legitimate individual or public interests.

In our view, the naming requirement was never intended by Congress to impose any obligation with respect to persons who might be anticipated to call in to the monitored telephone from other telephones not under electronic surveillance. Rather, it was only the individual whose telephone was being subjected to surveillance who was to be named—assuming, of course, that probable cause existed to believe that the person was engaging in the criminal activity under investigation. As will be shown below, this construction of the naming requirement is consonant with common sense and with the language and structure of the statute, and its adoption by this Court would in no way compromise the individual and public interests that the statute is designed to foster.[10]

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[10] The principle that persons whose own telephones are not being subjected to surveillance pursuant to a wire interception order need not be named in the order is subject to exception in one category of cases—when a telephone belonging to one individual is to be placed under surveillance because it is regularly used by another person for illicit activities, where the latter is the target of the investigation. For instance, a telephone in a store or tavern may be used by a narcotics conspirator, who is not the proprietor of the business, for transmitting messages about narcotics transactions; or a bookmaker may use the phone in a friend's apartment to receive wagers. In those cases, it may be appropriate to require naming of the criminal actors who are the principal targets of the investigation.

The interpretation we urge is not foreclosed by *United States* v. *Kahn, supra,* 415 U.S. at 155. That case involved the question whether a known user of the target phone whose complicity in the offense under investigation was not known should have been named. The Court concluded that the investigating agents were not required either to name all known users of the telephone, or to investigate them to determine whether there was probable cause to believe they were involved in the offense. The context of the dictum on which the court below relied confirms its plain meaning: that the government is not required to identify presumably innocent users of the target telephone.[11] It does not follow that all persons the government has probable cause to believe will be overheard in illicit conversations must be identified. That contention was simply not before the Court in *Kahn*; it is raised in this Court for the first time in this case.

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[11] The dictum follows an analysis of why Section 2518 should not be read to require the pre-authorization investigation of all likely users of the target telephone. The full paragraph in which it appears states (415 U.S. at 155):

> We conclude, therefore, that Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that that individual is "committing the offense" for which the wiretap is sought. Since it is undisputed that the Government had no reason to suspect Minnie Kahn of complicity in the gambling business before the wire interceptions here began, it follows that under the statute she was among the class of persons "as yet unknown" covered by Judge Campbell's order.

A. Neither The Language Nor The Structure Of The Statute Requires The Naming Of All Persons Reasonably Suspected Of Participating In Incriminating Conversations Over The Target Telephone

1. Section 2518(1)(b) requires that the application for wire interception authorization set forth a full and complete statement of facts and circumstances relied upon by the applicant to justify his belief that an order should be issued, including, pursuant to subsection (iv), "the identity of the person, if known, committing the offense and whose communications are to be intercepted." Section 2518 (4)(a) contains the same requirement for the interception order: it also must specify "the identity of the person, if known, whose communications are to be intercepted" (see *United States* v. *Kahn, supra,* 415 U.S. at 152). Thus the plain language of both Sections requires simply that "the person" committing the offense—the target of the interception—is to be identified if known.[12] It does not require that "any person" or "all persons" expected to participate in incriminating conversations with the target over the monitored telephone must be so identified. Cf. 18 U.S.C. 2520. The most reasonable interpretation of this statutory language is that although it would or-

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[12] This choice of language was apparently deliberate. The New York statute discussed in *Berger* v. *New York,* 388 U.S. 41, 59, required the identification of "the person *or persons* * * * to be overheard" (emphasis supplied). Congress used *Berger* as a guide in drafting Title III, S. Rep. No. 1097, 90th Cong., 2d Sess., pp. 66, 75 (1968).

dinarily be expected that many persons will be overheard, only the principal target of the interception must be identified. This will almost always be the individual whose phone is to be monitored.[13]

The context of Section 2518(1)(b)(iv) strongly supports this reading of the statute. Section 2518(1)(b) requires that the application include a complete statement of the facts relied upon to justify the belief that the order should issue, including a description of the facilities from which the communication is to be intercepted (subsection (ii)), the type of communications to be intercepted (subsection (iii)) and the identity of the person whose illicit communications are to be intercepted (subsection (iv)). Congress in this provision was thus evidently focusing on a complete description of the telephone to be intercepted—its identification, use, and primary user.

Moreover, elsewhere in Section 2518, when reference is clearly to the principal target, the person whose phone is to be monitored, Congress used language strikingly similar to that in Sections 2518(1)(b)(iv) and 2518(4)(a). For example, the last

[13] This interpretation does not, as suggested by Judge Godbold dissenting in *United States* v. *Doolittle*, 518 F. 2d 500, 501 (C.A. 5), permit the government unlimited discretion in selecting the individual to be named. A special showing would be required to demonstrate that someone other than the listed user of the monitored telephone was the principal target. And if two or more persons are known to be using the telephone equally to commit the offense, and thus are equally targets of the investigation, all must be named. Here, Spaganlo, Kotoch, and Florea would all seem to have been principal targets.

paragraph of Section 2518(4) directs communications common carriers and other persons to provide information, facilities, and technical assistance to accomplish the authorized interception unobtrusively and with a minimum of interference with the services "such carrier * * * or person is according the person whose communications are to be intercepted." Since the only person whose services are likely to be disrupted in accomplishing the interception is the person whose phone is being monitored, in this context it is clear that the "person whose communications are to be intercepted" is the primary target. The same language in 2518(1)(b)(iv) should be interpreted the same way.[14]

In contrast, when Congress wanted to refer to any person who might be overheard during the course of the interception, it did so unambiguously. For example, in Section 2510(11) Congress provided standing to make a suppression motion to "a person who was a party to any intercepted wire or oral communication or a person against whom the

[14] Similarly, Section 2518(3) requires the judge to find probable cause for belief that an individual is committing an offense specified in Section 2516, that communications concerning that offense will be intercepted, and that "the facilities from which * * * the wire or oral communications are to be intercepted are being used * * * in connection with the commission of such offense, or are * * * listed in the name of, or commonly used by such person" (Section 2518(3)(d)). Here, the focus is again on the primary target; the findings of probable cause required clearly relate to him, and not to others with whom he may talk. The assumption again is that the primary target is the person using the phone in the "commission of the offense".

interception was directed." And Section 2518(8)(d) directs the judge to order inventories served upon "parties to intercepted communications" not named in the order, if he determines such notice is in the interest of justice. In sum, if Congress had intended to require the application for an intercept order to identify other probable parties to intercepted conversations, in addition to the principal subject of the monitoring, Section 2518(1)(b)(iv) would have clearly so stated.

2. The structure of Title III also indicates that only the principal target of the interception must, if known, be named in the application and order. Once the principal target is named, all conversations on the target phone relating to the illegal enterprise may properly be overheard. Section 2518(5), on the other hand, requires that interception of conversations not relating to the defined offenses is to be minimized. The statute thus reflects a decision to prevent excessive overhearing by restricting on the basis of the types of conversations to be overheard, rather than on the basis of the identity of the persons conversing.[15] Thus, innocent conversations, even those of a named target of the interception, are protected, while conversations relating to the defined offense are

[15] Since the limitation was drawn in terms of the content of the conversations, it was necessary to provide explicitly that conversations involving crimes other than those identified in the order could be used in evidence (18 U.S.C. 2517(5)). But since there was no limitation based on the participants in the conversation, no such explicit savings provision was necessary concerning the illicit conversations of unnamed users.

not, even though the participants have not been previously suspected (*United States* v. *Kahn*, *supra*, 415 U.S. at 152-154).[16]

The requirement in Section 2518(1)(e) that an intercept application must disclose all previous applications "involving any of the same persons, facilities or places specified in the application" and whether or not the previous application was granted, also reflects congressional understanding that only the target of the intercept need be named in an application. If, as the court below held, the application must identify every person as to whom there is, when the application is filed, probable cause to believe he will be overheard (although his telephone is not being monitored and he is not the primary target of the investigation), persons will often be named who are not in fact overheard. No purpose would be served by requiring that such persons be identified in subsequent applications for intercept orders as having been listed in previous applications.[17] Instead, Section 2518(1)(e) shows that Congress expected only the person whose phone is to be monitored to be named in the intercept ap-

[16] Indeed, as noted in *Kahn*, *supra*, 415 U.S. at 157-158, n. 18, the Senate rejected an amendment which would have required the suppression of conversations of persons not named in the order. 115 Cong. Rec. 14718 (1968) (Amendment 735).

[17] Such a result would be particularly anomalous in view of the fact that the Section does not require the naming in subsequent applications of a targeted user of the telephone originally intercepted if that user was not named in the original application and order because he had not then been identified by name.

plication and order; the judge who is subsequently asked to issue another intercept order is to be informed of all previous applications targeted against that individual.

Section 2510(11) also supports our reading of the naming requirement, although Judge Godbold, dissenting in *United States* v. *Doolittle*, 518 F. 2d 500, 503, found in it a basis for a broader requirement. Section 2510(11) grants standing to seek suppression to any party to an intercepted conversation or "person against whom the interception was directed." As Judge Godbold noted, the Section thus reflects congressional concern for the interests of such persons, and it may be appropriate to read the naming requirement in Section 2518(1)(b)(iv) to include the person "against whom the interception [is] directed" (518 F. 2d at 503). But Judge Godbold erred in interpreting that phrase as including all those whom the government hopes to overhear and ultimately to convict. There are only two classes of people who have standing under Section 2510(11) to move to suppress: parties to intercepted conversations; and the person whose telephone is monitored, *i.e.*, the principal target of the investigation. *Alderman* v. *United States*, 394 U.S. 165, 175, n. 9, 176; S. Rep. No. 1097, 90th Cong., 2d Sess., p. 9 (1968). Thus, it is clear that the person "against whom the interception was directed" is simply the principal target, the same person referred to in Section 2518(1)(b)(iv).

B. The History Of The Statute Supports Our Construction Of The Naming Requirement

The legislative history of the statute supports our interpretation of 18 U.S.C. 2518(1)(b)(iv) as requiring only the naming of the target of the interception: it shows that Congress intended its particularization requirements to reflect the demands of the Fourth Amendment, and did not wish to impose in addition substantial technical requirements for wire interception applications and orders. We submit, therefore, that 18 U.S.C. 2518(1)(b)(iv) should not be interpreted as adding a stringent naming requirement not required by the Fourth Amendment.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 was enacted after this Court in 1967 had suggested in *Berger* v. *New York*, 388 U.S. 41, and *Katz* v. *United States*, 389 U.S. 347, that, while electronic surveillance is covered by Fourth Amendment principles requiring probable cause and warrants for searches and seizures, it would be possible to construct a statutory system that would satisfy the Amendment. After *Berger*, Congress considered a bill that was the product of the synthesis of two bills, one drafted before and the other after *Berger* was decided—neither of which contained identification requirements. S. Rep. No. 1097, *supra*, at p. 66; Hearings on Bills Relating to Crime Syndicates, Wiretapping, etc. before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st

Sess., pp. 75-79, 1001-1010 (1967). While the bills were pending in committee, this Court decided *Katz*. The bill was then redrafted to conform with *Katz* as well as *Berger;* the identification provisions at issue here were added at that time (see S. Rep. No. 1097, *supra*, at p. 101).

The constitutional standards enunciated in *Berger* and *Katz* thus served as guidelines in drafting Title III (S. Rep. No. 1097, *supra*, at pp. 66, 74-75). While recognizing the need to protect privacy, and emphasizing that unauthorized wiretapping was to be outlawed, the legislative history makes clear that "[t]he major purpose of Title III is to combat organized crime" (*id.* at 70; see *United States* v. *Kahn*, *supra*, 415 U.S. at 151). The Report emphasized the value of electronic surveillance for that purpose, and rejected the argument that the use of this tool by law enforcement officers pursuant to court order would unduly threaten legitimate privacy interests (S. Rep. No. 1097, *supra*, at pp. 71-74). Congress evidently did not intend to circumscribe these efforts more narrowly than is constitutionally necessary. Instead, it summarized the bill as "[l]egislation meeting the constitutional standards set out in the decisions, and granting law enforcement officers the authority to tap telephone wires and install electronic surveillance devices in the investigation of major crimes and upon obtaining a court order" (*id.* at 75). This general intention is also reflected in the brief discussion of Section 2518(1)(b), which states simply, citing *Berger* and *Katz*, that "[e]ach of these requirements re-

flects the constitutional command of particularization" (*id.* at 101).[18]

It would be inconsistent with this legislative history to interpret Section 2518(1)(b)(iv) as imposing a broad naming requirement extending far beyond what is constitutionally necessary. The Fourth Amendment requires warrants to specify the person or place to be searched (in this context, the telephone line) and the things to be seized (here, conversations about particular criminal enterprises). There is no requirement that the person whose property is to be searched or whose things are to be seized be named. Translated into the context of electronic surveillance, therefore, there is no constitutional necessity to name anyone, even if known, in the application or order. See *United States* v. *Kahn*, *supra*, 415 U.S. at 155, n. 15. It may be that Congress read *Berger* and *Katz* as requiring, as a constitutional matter, that the subject of the surveillance be named if known.[19] But it would hardly have read those cases as requiring the naming of all parties likely to be overheard

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[18] Similarly, the intercept order was intended to "link up specific person, specific offense, and specific place [or telephone]," thereby meeting "the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity." *Id.* at 102.

[19] See S. Rep. No. 1097, *supra*, at p. 102, citing, without explanation, *West* v. *Cabell*, 153 U.S. 78, in support of 2518(4)(a)'s naming requirement. *West* deals with the need for proper identification of the subject of an arrest warrant; it has no particular relevance to search warrants.

conversing about the offenses under investigation. In neither case was that issue involved, either directly or by implication.[20]

The discussion of the inventory requirement (Section 2518(8)(d)) in the legislative history also reflects the assumption that only the person whose telephone is to be monitored is to be named in the order (S. Rep. No. 1097, *supra*, at p. 105). As reported out of committee, an inventory was to be served only on "the person named in the order" and could be post-

[20] *Berger* found a New York statute inadequate, *inter alia*, for lack of particularity in describing the conversations to be seized. The targets of the two interceptions there involved had been named in the orders, and there was evidently no claim that the defendant, Berger, should have been named (388 U.S. at 44-45). The Court did not find New York's statutory naming requirement helpful in meeting the constitutional standard of particularity (388 U.S. at 59):

> It is true that the statute requires the naming of "the person or persons whose communications, conversations or discussions are to be overheard or recorded . . . ." But this does no more than identify the person whose constitutionally protected area is to be invaded rather than "particularly describing" the communications, conversations, or discussions to be seized.

In *Katz*, federal agents had monitored a specific suspect's calls by a device attached to a public telephone booth. This violated the Fourth Amendment because it was done without a warrant. The Court noted, 389 U.S. at 354, that "this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized" the monitoring. There was no suggestion that the Constitution required that such a warrant name any person with whom Katz might be expected to converse.

poned for good cause. The discussion in the Senate Report assumes that only a single person, the subject of the surveillance, will be named in the order and thus served with an inventory, and that postponement will be appropriate when interception on a particular phone stops because the subject moves. The reference to the subject is thus clearly to the owner of the phone, the only person to be named in the application or order.

C. A Broad Naming Requirement Would Hamper Law Enforcement Without Protecting Legitimate Privacy Interests

As we have shown, the statutory language and structure as well as the legislative history support a reading of Section 2518(1)(b)(iv) as requiring the naming only of the principal target or targets of the investigation whose telephones are to be monitored, rather than of persons whose phones are not to be monitored but who may be overheard calling in to discuss illegal activities with the principal target. Further support for the conclusion that such a reading is the one intended by Congress can be found in the impracticality of the contrary interpretation adopted by the court of appeals in this case. The court's requirement—that a person must be identified whenever there is probable cause to believe that his conversations relating to the offense being investigated will be overheard—will significantly impede use of electronic surveillance as a law enforcement tool, without safeguarding legitimate privacy interests or protecting against official abuses.

1. A requirement that agents investigating major crimes must make probable cause determinations about all persons who may be overheard during a proposed electronic surveillance would "subvert the effectiveness of the law enforcement mechanism that Congress constructed" almost as much as the similar requirement this Court rejected in *Kahn*, *supra*, 415 U.S. at 153. In the course of an already complex and necessarily fast moving investigation, agents would be required to gather and assess all information known to any government investigator about all persons suspected of complicity in the illegal activity and all persons suspected of communicating by telephone with the subject of the intercept. Such persons may very well be scattered across the country, especially in bookmaking and narcotics cases, and information about them is likely to be in many different government files, keyed to a number of aliases and nicknames.[21] Nevertheless, investigating agents would be required to make two probable cause determinations as to every one of these persons: first, whether he is committing the offense, and second, whether he will be overheard during the interception participating in conversations relating to the offense. See, *e.g.*, *United States* v. *Russo*, 527 F. 2d 1051, 1056 (C.A. 10), petition for a writ of certiorari pending, No. 75-1218. An error of judgment as to either element may result in suppression of the evi-

[21] For example, here both Buzzacco and Spaganlo used aliases (App. 34, 64, 170).

dence, not only against the unnamed conspirator, but even against the named target.[22]

The agents and government attorneys must make these judgments themselves, at least in the first instance, although they will be subjected to judicial reevaluation after the interceptions are completed. The agents cannot realistically present to the issuing judge all information they possess about every suspect who might be overheard, in order to have the judge determine whom to list in the order. Nor, indeed, is it clear what would be the effect of a judge's refusal to list in the order a person named in the application. If the agent errs, the penalty is suppression of evidence of wrongdoing that will often be necessary to convict. The same result may follow even when the existence of probable cause is not apparent at the time of the application, because at a later time a court with knowledge of the results of the interception, may determine that "[a] detached observer could conclude from the evidence available * * * [when the affidavit was prepared] that the government had probable cause to believe" the person would be overheard, *United States* v. *Bernstein*, 509 F. 2d 996,

[22] A failure to name a person whose incriminating conversations with the named target the agent had probable cause to expect to overhear has been held to prohibit the use against the named target of his conversations with the unnamed conspirator. *United States* v. *Picone*, 408 F. Supp. 255 (D. Kan.), appeal pending C.A. 10, No. 76-1027. Cf. *United States* v. *Chiarizio*, 525 F. 2d 289 (C.A. 2); *United States* v. *Bellosi*, 501 F. 2d 833 (C.A. D.C.).

1003.[23] But in many cases, including this one, the problem is that a detached observor could also conclude that no probable cause existed.[24] The agent must then guess, at the peril of possible frustration of aspects of the investigation, which result will ultimately seem appropriate to a court after the investigation is concluded. There is no reason to require such guesses from law enforcement officials, particularly where the decision will not affect where the interception will occur, but simply how many names are included in the application and order in addition to that of the primary target whose telephone is to be monitored. Cf. *Hoffa* v. *United States*, 385 U.S. 293, 311; *Spinelli* v. *United States*, 393 U.S. 410.

[23] The court below evidently used the same test, since in finding that there was probable cause here, it relied on cases affirming a magistrate's finding of probable cause in similar circumstances (Pet. App. 12a).

[24] In the instant case, for example, the agents knew that two of the suspects had made calls to a number in Youngstown, Ohio, listed under an alias of Buzzacco, who was known to have been a bookmaker. During the first intercept, some of the calls overheard involved a "Buzz" or "Buzzer", using a telephone in Niles, Ohio, not listed in the name of any known alias of Buzzacco, discussing general gambling problems with a named target. The court agreed that it was not clear when the government had discovered that Buzzacco had moved his operation to Niles. Nevertheless, on the basis of this record, the court concluded that there was probable cause to name Buzzacco in the renewal application and suppressed all his conversations intercepted pursuant to the renewal order. The evidence on which the court in *United States* v. *Bernstein*, *supra*, 509 F. 2d at 1002-1003, found probable cause to name a conspirator was equally ambiguous.

In order to avoid the frustration of prosecution through the suppression of evidence, law enforcement officers will be required by the decision below to follow a policy of overinclusion in drafting applications, *i.e.*, to identify persons in intercept applications whenever it is possible that a reviewing court subsequently might find that probable cause did in fact exist.

But the practice of including doubtful names also has its drawbacks, both to the prosecution and to the individuals named. Several courts have suggested that improperly naming a person in an interception application and order may justify the suppression of his intercepted conversations. *United States* v. *Kirk*, C.A. 8, Nos. 75-1359, 75-1364, 75-1365, 75-1386, 75-1429, 75-1449, and 75-1542, decided April 22, 1976; *United States* v. *Principie*, C.A. 2, Nos. 75-1175—75-1177, decided March 4, 1976, petitions for writs of certiorari pending, Nos. 75-1393, 75-1394; *United States* v. *Tortorello*, 480 F. 2d 764, 775-776 (C.A. 2), certiorari denied, 414 U.S. 866.[25] As for the additional individuals named in the effort

[25] If the requirement that alternative investigative techniques be shown to be ineffective (18 U.S.C. 2518(1)(c)) applies to all those named in the order and not just to the subject, unnecessary naming could trigger further investigation on pain of suppression. In that case, investigation requirements could easily become so onerous that the utility of wire interceptions as an investigative tool would be negated. In any event, the need for extensive investigation thus generated is exactly what this Court specifically eschewed in *United States* v. *Kahn*, *supra*.

to protect against subsequent suppression, those who are not overheard engaging in illegal conversations will suffer when the intercept papers become public during motions to suppress. In a similar context, the naming of persons as unindicted conspirators in an indictment has been held to impinge on judicially cognizable personal interests in reputation and ability to obtain employment. *United States* v. *Briggs*, 514 F. 2d 794 (C.A. 5).[26]

An expansive reading of the naming requirement thus will significantly complicate law enforcement efforts and subject those named, but not in fact overheard, to predictable harm. These disadvantages might be justified if the requirement protected any substantial private or public interest. But no important interests are served by the inclusion of the names of persons other than the principal target in an intercept application and order.[27] Indeed, the consequences which flow from the failure to name such persons are so insubstantial that we submit that Congress could not have intended to hamper the use of electronic interceptions in combatting major crimes

[26] Moreover, the fact that a person has been named in an intercept order and application may help to support a finding of probable cause for a subsequent arrest or search warrant. Cf. *Jones* v. *United States*, 362 U.S. 257, 271.

[27] The naming requirement does not relate to whether there is probable cause for the issuance of the order. It is clear that, whether or not those who may be overheard are identified, the affidavit must allege facts upon which the issuing judge can base a finding that there is probable cause to issue the order. 18 U.S.C. 2518(4).

by requiring that all persons who may be expected to be overheard must be named.

2. The burdens imposed by the decision of the court below upon those who administer the Act do not achieve any compensating benefits. The innocent user of a monitored facility (or its innocent use by the conspirators) is not thereby insulated from electronic surveillance, nor are abuses by law enforcement officials in conducting interceptions under Title III avoided or reduced.

The chief safeguard for the privacy of the innocent user (and the innocent use by the conspirator) is the minimization requirement of the statute, 18 U.S.C. 2518(5), which requires that the interception "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." The inclusion of names in addition to the subject in an application and order will not facilitate minimization.[28] In many cases, all calls must initially be carefully scrutinized to determine whether they relate to the subject under investigation and to detect previously unsuspected conspirators. See *Bynum* v. *United States*, Nos. 74-1445, decided November 11, 1975, slip op. 4 (dissent); *United States* v. *James*, 494 F. 2d 1007, 1020-1021 (C.A. D.C.), certiorari denied *sub nom. Tantillo* v. *United States*, 419 U.S. 1020. In those cases, "the only feasible approach to minimization is the gradual develop-

[28] Instead, more extensive overhearing of the conversations of a named member of the conspiracy may be justified, see *Bynum* v. *United States*, Nos. 74-1445, decided November 11, 1975, slip op. 3-4 (dissent).

ment, during the execution of a particular wiretap order, of categories of calls which most likely will not produce information relevant to the investigation." *United States* v. *Scott*, 516 F. 2d 751, 754-755 (C.A. D.C.), certiorari denied, April 5, 1976 (No. 75-5688).[29]

Nor would a broad naming requirement covering large numbers of persons whose telephones are not to be monitored aid a judge in deciding whether an interception order should issue, or assist him in supervising an intercept. In deciding whether to issue an intercept order, the judge has before him the particulars in the application and supporting papers showing probable cause. If the judge believes more information, including additional names, is necessary, he "may require the applicant to furnish additional testimony or documentary evidence in support of the application." 18 U.S.C. 2518(2). After the warrant is issued, the authorizing judge may require reports concerning "what progress has been made toward achievement of the authorized objective and the need for continued interception." 18 U.S.C. 2518 (6). If the reports are deficient in any particular, the judge can request more specific information, including names of suspects, and can even terminate

[29] While identification of the person whose telephone calls are to be monitored over a particular telephone might be useful in limiting a surveillance to times when the subject is near the phone, identification of persons talking with the subject from unmonitored telephones would not have any similar utility: persons involved in a conspiracy cannot be expected to announce their names at the beginning of every conversation.

the interception. The judge, in short, has ample authority to obtain any information he believes necessary either for the issuance of an order or for the control of the interception. He is not likely to be assisted in his responsibilities by being required to review additional information about all other persons who may be expected to be overheard.[30] Instead, that review may tend to obscure the important issue before him: whether there is probable cause to believe that an individual is committing the offenses under investigation and will be heard discussing them on the telephone to the intercepted, and whether other investigatory procedures are inadequate. 18 U.S.C. 2518(3). His decision whether or not to issue the order turns on the resolution of that problem, not a review of the propriety of identifying various other individuals who may also be overheard.[31]

[30] In order to justify the inclusion of each name, the affidavit would presumably have to list detailed facts and circumstances relating to that person—for example, telephone records, physical surveillance, criminal record, informant information. In addition, if that person had ever been named in a previous application (even if not the subject and if not actually overheard), the details of that application would have to be included. An application involving an investigation of even a moderate-sized conspiracy could easily become voluminous, and the issuing judge inundated with information of little or no relevance to the decision whether to authorize the surveillance.

[31] It has been suggested that the judge's decision to issue the order, or the Attorney General's decision to authorize the application for it, may be affected by knowledge of the identity of persons likely to be overheard in illicit conversations. *United States* v. *Bernstein*, 509 F. 2d 996 (C.A. 4); *United*

The naming of a person in an intercept application and order triggers two statutory requirements: first, if named in an order, he must be served with an inventory, notifying him that the interception was authorized and advising him whether and for how long it was in effect (18 U.S.C. 2518(8)(d)); and second, any subsequent applications to monitor his telephones must disclose all previous applications in which he was named (18 U.S.C. 2518(1)(e)). Neither provision indicates that a policy of naming all suspects in an application would substantially facilitate proper administration of the Act.

Section 2518(8)(d) contains both a mandatory and a discretionary notice requirement: all those named in the order must be notified, as well as those the issuing judge determines (after the interception is concluded) should receive notice in the interest of justice. Thus, whether or not named in the order, a person whose conversations are intercepted will receive notice if the judge so directs. Since, at least as

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States v. *Doolittle, supra*, 518 F. 2d at 501, 503 (dissent). Ordinarily, however, the Attorney General or the judge will not be familiar with the names of such persons, and even where the names are familiar, it is difficult to see how they could properly affect the decision. It has never been suggested that persons expected to be overheard in innocent conversations must be identified, so disclosure would not facilitate a decision to protect recognized innocent persons' privacy by refusing to permit interception. And it can hardly be suggested that Congress intended the Attorney General or a district judge to refuse to authorize an otherwise lawful wire interception merely because they recognized the name of a person who was suspected of complicity.

to those whose own telephones were not monitored, the need for notice turns on whether the individual was in fact overheard in incriminating conversations, not on whether he was expected to be so overheard, the decision as to who should receive notice is most appropriately made after the interception is completed, when its actual results are known. There is no need to notify those who were expected to be overheard, but were not. Thus, the discretionary notice provisions more accurately serve the statutory purposes than would the effect of a broad naming requirement on the mandatory notice provisions.

The purposes of the interception history provisions of Section 2518(1)(e) are likewise not substantially furthered by expansive reading of the naming requirement. Both "judge shopping" for approval of interception applications and the excessive use of wire interceptions directed against any individual are effectively prevented by requiring the disclosure of previous applications to monitor the phones of the subject of the investigation.[32] Naming the subject of

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[32] The court in *United States* v. *Bellosi*, 501 F. 2d 833, 838-839 (C.A. D.C.), suggests that the Section also permits the judge to consider the precedential value of the earlier interceptions, both in terms of the results obtained and the formulation of limitations on the order. These purposes are adequately served by naming only the subject of the order. In addition, the court suggests that the disclosure of previous applications might enable the judge to discover whether information relied on in the current application was derived from prior illegal interceptions. This marginal purpose might be served to some extent by requiring full disclosure of all

the interception will adequately protect against excessive use of electronic surveillance against the same person. It remains conceivable that a person not named might be harassed by interceptions which in actuality are directed against him even though he is not named. Perhaps if such a showing could be made, the courts could appropriately apply the suppression remedy in such a case.[33]

In sum, the language, structure, history and purposes of the statute all indicate that Congress intended to require only that the subject of the investigation, the individual whose telephone is to be monitored, be named in the application order. He is the person whose privacy will be primarily invaded, and naming him, if his identity is known, will focus the issuing judge's attention on the real question before him: whether sufficient grounds have been shown for that invasion. Naming additional people would tend to obscure that question and would impose very substantial additional burdens on law enforcement officials without countervailing benefits to the legitimate interests of those involved.

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interceptions involving all persons who might be overheard. It is not, we submit, substantial enough to warrant imposition of such a requirement.

[33] In such a case, the prosecutor's intent to evade the judicial supervision required by the Act might render the interception unlawful, and thus subject to suppression under Section 2518(10)(a)(i). See *infra*, pp. 46-50.

II

THE GOVERNMENT DID NOT VIOLATE THE ACT WHEN IT INADVERTENTLY FAILED TO GIVE THE ISSUING JUDGE THE NAMES OF TWO PERSONS OVERHEARD IN THE COURSE OF THIS WIRE INTERCEPTION

On February 21, 1973, after the conclusion of the interceptions, the government submitted a list of 37 names in a proposed order directing service of inventory pursuant to 18 U.S.C. 2518(8)(d). This list was intended to include all persons whose conversations the government had overheard during the interceptions.[34] The issuing judge, Judge Battisti, accepted and signed the proposed order (App. 120). Thereafter, an inventory notice was served on all the persons listed. Subsequently, in September 1973, the government discovered that two persons had been omitted from the list. An amended order was submitted to and signed by Judge Battisti, directing service of inventory notice on those two persons (App. 129). Respondents Merlo and Lauer were not named in either order and were never served with inventory notices. They were indicted on November 1, 1973; the indictment was unsealed November 6, and the intercept orders, applications and related papers were

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[34] Although more was provided here, it is the Department of Justice's policy to provide the issuing judge in every case with the name of every person who has been overheard as to whom there is any reasonable possibility of indictment. Additional names are, of course, provided if requested by the issuing judge.

made available to all defendants, including Merlo and Lauer, on November 26, 1973. On December 12, 1973, respondents Merlo and Lauer moved to suppress evidence derived from the interception on the grounds they had not been served with an inventory notice (App. 1, 3, 7, 131, 133). On December 17, 1973, all the defendants, including Merlo and Lauer, received transcripts of the interceptions in which they were overheard (Pet. App. 19a).[35]

Their motions to suppress were granted by Judge Krupansky, who concluded that the government's failure to serve Merlo and Lauer with inventory notices violated the statute and warranted suppression as to them of the intercepted communications (Pet. App. 54a). On appeal, the court of appeals agreed, one judge dissenting, with the district court. It found that the government violated a statutory duty under Section 2518(8)(d) to furnish information to the issuing judge concerning the conversations overheard so that the latter could exercise his discretionary authority to decide whether Merlo and Lauer should be served with notice of interception. The court concluded that suppression was required even in the absence of prejudice to either defendant and even if the omission was the result of "inadvertent error" rather than a deliberate attempt to circumvent the statute (Pet. App. 13a-17a).

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[35] Respondents Merlo and Lauer imply in their brief in opposition to the petition for a writ of certiorari (pp. 2, 5-6) that they first received actual notice of the interception in the government's response to their discovery motions. These motions were filed November 30, 1973 (App. 4).

We submit that there was no violation of the statute here. Section 2518(8)(d) provides that within ninety days after the termination of an intercept order or extensions thereof "the issuing * * * judge shall cause to be served, on the parties named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory." The inventory must include notice of the date the order was entered, the period of authorized interception, and whether or not communications were intercepted during that period. Upon a showing of good cause, the service of the required inventory may be postponed.

Section 2518(8)(d) thus provides for mandatory service of inventory notice on those named in the order and discretionary service on other parties to intercepted communications. There is no express requirement that the government routinely provide the judge with any specific information upon which to base his exercise of discretion, either precise identification of individuals, as the court below required, or descriptions of categories of individuals, as the court found necessary in *United States* v. *Chun*, 503 F. 2d 533, 540 (C.A. 9).[36]

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[36] In *Chun*, the court held alternatively that "[t]o discharge [his] obligation the judicial officer must have, at a minimum, knowledge of the particular categories into which fall all the individuals whose conversations have been intercepted. Thus, while precise identification of each party to an intercepted communication is not required, a description of the general class, or classes, which they comprise is essential to enable

Moreover, no useful purpose is served by reading such a requirement into the statute. It is obvious that in any interception of appreciable length there will be persons overheard participating in criminal-related conversations (some of whom the government expects to indict, and some of whom it does not) and there will also be persons overheard during innocent conversations. After the intercept, it is a simple matter for the judge to ask for the names and addresses of any such persons, or any other information he desires, in order to exercise his discretion with respect to the service of inventories. It is therefore unnecessary to read into the statute a routine requirement to provide the judge with a list of names or categories in the absence of any request by him for such information. When, as here, the government furnishes the names of 39

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the judge to determine whether additional information is necessary for a proper evaluation of the interests of the various parties." Although the court below expressed its agreement with this language (Pet. App. 14a), in fact it went further than requiring simply the description of general classes, when it found that "the Government had a duty to disclose the identity of Merlo and Lauer" (Pet. App. 17a), thus perhaps requiring the "precise identification of each party to an intercepted communication" which the court in *Chun* had asserted was not required. The court below did not, however, define the extent of the duty it imposed on the government. It is unclear whether, under the majority opinion, the government must inform the issuing judge of the names of all persons overheard, or only those overheard in incriminating conversations, or only those it intends to indict. Nor is it clear what degree of certainty of identification is necessary to trigger the implied statutory duty.

persons to the court, and the judge requests no further information on which to base his exercise of discretion, the requirement set forth in the statute is fully satisfied.[37]

Nor does the purpose of Section 2518(8)(d), as revealed by its history, require expansion of the statute beyond the specific requirements of its language. The statutory purpose was to provide for notice to "insure the community that the techniques are reasonably employed" and to make the interception known at least to the subject" of the interception so that he may seek appropriate civil redress "if he feels that his privacy had been unlawfully invaded." S. Rep. No. 1097, *supra*, at p. 105.[38] Obviously, this con-

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[37] We do not, of course, suggest that literal compliance would be sufficient to protect the government from sanctions if it were deliberately to mislead the judge by submitting as complete a list known to be incomplete. Cf. *United States* v. *Bellosi*, 501 F. 2d 833 (C.A. D.C.). Nor would such compliance prevent taking whatever steps, such as continuances to permit preparation for trial, might be necessary to remedy any prejudice to the defendants who were overlooked.

[38] As reported from committee, Section 2518(8)(d) provided only for notice to the subject of the interception. S. Rep. No. 1097, *supra*, at p. 105. The clause allowing for discretionary notice to other parties to intercepted communications was added by amendment on the floor of the Senate. Amendment No. 754; 114 Cong. Rec. 14485-14486 (1968). The purpose of the amendment was to provide for notice to all parties to any intercepted conversations, if that were constitutionally necessary. Otherwise, "since legitimate interests of privacy [*e.g.*, of an intercepted businessman vis-a-vis his legitimate customers] may make such notice to all parties undesirable" (*id.* at 14485), the decision concerning whom to serve was left to the issuing judge for case-by-case deter-

gressional purpose was amply satisfied when 39 persons received formal notice of the interception; this was no secret wiretap.

Even if, as the court below concluded (Pet. App. 14a), it is appropriate to read into the statute some duty on the part of the government to inform the court of those whose conversations have been intercepted, that duty should only require the government to use its best efforts to provide a complete list of such persons. Many people may be heard in the course of a single interception;[39] they will often fail to identify themselves, and they may speak only briefly. In such circumstances, errors in identification and in listing are inevitable, and a standard requiring the government to provide the judge with

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mination. Mandatory notice only to those named in the order has since been held to satisfy the Constitution. *United States* v. *Ramsey*, 503 F. 2d 524, 531, n. 24 (C.A. 7), certiorari denied, 420 U.S. 932; *United States* v. *Tortorello*, 480 F. 2d 764, 774 (C.A. 2), certiorari denied, 414 U.S. 866; *United States* v. *Whitaker*, 474 F. 2d 1246 (C.A. 3), certiorari denied, 412 U.S. 953; *United States* v. *Cafero*, 473 F. 2d 489, 498-500 (C.A. 3), certiorari denied, 417 U.S. 918. See also *United States* v. *Cox*, 462 F. 2d 1293, 1303-1304 (C.A. 8), certiorari denied, 417 U.S. 918; *United States* v. *Cox*, 449 F. 2d 679, 685, 687 (C.A. 10), certiorari denied, 406 U.S. 934.

[39] In 1975, the average number of persons overheard per federal interception was 71. *Report on Applications for Orders Authorizing Or Approving The Interception of Wire Or Oral Communications, January 1, 1975 to December 31, 1975*, Administrative Office of the United States Courts, Table 4, p. X (April, 1976). There were 18 federal interceptions in which more than 100 persons were overheard; one involved 459 persons. *Id.* at Table A-1, pp. 2-12.

a comprehensive list of all those who are identifiable is unreasonable. No support for such a flat requirement can be found in the Act. Instead, by requiring the judge to determine case-by-case whether the interests of justice require service of the inventory on persons not named in the order, the statute indicates the appropriateness of a similar case-by-case analysis to determine whether the interests of justice have been adversely affected by the government's failure to identify such persons.

Since Merlo and Lauer received access to the intercept papers and transcripts at the same time as the other defendants, they were not prejudiced by the fact that they received no inventory notice. Thus, the interests of justice were not adversely affected by the inadvertent failure to include them in the inventory lists, and the government should not be held to have violated any implied statutory duty to supply the judge with reasonably comprehensive lists of those overheard.

III

SUPPRESSION OF EVIDENCE IS NOT APPROPRIATE EVEN IF THE COURT BELOW WAS CORRECT IN HOLDING THAT THE PROCEDURES FOLLOWED WERE DEFECTIVE

Even assuming that the failure to name Buzzacco, Donovan and Robbins in the intercept application and order and to identify Merlo and Lauer in the inventory lists submitted to the judge was improper, these failures do not merit suppression of the evi-

dence derived from the interception of their conversations, either under the statute or under traditional judicial principles.

A. The Statute Does Not Authorize Suppression Here

Section 2515 prohibits the use at trial of intercepted communications, or evidence derived therefrom, where disclosure of that evidence would be in violation of the statute. Section 2515 is implemented by Section 2518(10)(a), which defines the situations in which evidence obtained through interceptions is subject to suppression. *United States* v. *Giordano*, 416 U.S. 505, 524. Section 2518(10)(a) permits motions to suppress on the following grounds:

> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

Contrary to the conclusion of the court below, the defects it identified in the procedures utilized here do not justify suppression under any of the subsections of 2518(10)(a). See *United States* v. *Doolittle*, *supra*, 507 F. 2d at 1371-1372; *United States* v. *Civella*, C.A. 8, Nos. 75-1522, 75-1525, 75-1528, 75-1530, 75-1532, decided April 16, 1976, slip op. 15-19. Obviously neither the failure to serve inventories nor

the failure to name certain individuals in the applications or orders rendered the applicable order of authorization insufficient on its face. And, despite such failures, each interception was carried out in conformity with the applicable order of authorization. Suppression for these failures, if covered at all by Section 2518(10)(a), must be authorized by subsection (i). We submit that the language "unlawfully intercepted" should not be stretched to encompass such failures.

The stretching required would be substantial. Indeed, the opinion below does not suggest any way in which the language of subsection (i) can be read to cover a failure to serve inventories. The subsection has no application to violations of duties arising only after the interception is completed. Even if such subsequent errors occur, the interceptions themselves were lawful, and subsection (i) does not authorize the suppression of communications lawfully intercepted.

The error, if any, in failing to name Buzzacco, Donovan and Robbins occurred before the interception and thus could conceivably have rendered the interception of their conversations unlawful. But their conversations suppressed here were either with named targets or with previously unknown co-conspirators. The government had an unquestioned right, by virtue of the intercept order, to overhear the conversations of the targets and others unknown. Thus, these conversations were scarcely "unlawfully intercepted", even if the court below was correct in con-

cluding that the other participants in them should have been named.

There is a further obstacle to the application of Section 2518(10)(a)(i) to the procedures involved here. That section was construed in *United States* v. *Giordano*, *supra*, 416 U.S. at 524-529, where this Court held that it embraced "any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device" (*id.* at 527). In the related case of *United States* v. *Chavez*, 416 U.S. 562, 574-575, this Court explained that Section 2518(10)(a)(i) does not require suppression for "every failure to comply fully with any requirement of Title III."

Neither the naming nor the inventory requirement tends to limit the use of intercept procedures. Errors in implementing post-intercept notice procedures can scarcely affect the original decision to authorize the interception. The fact that 39, rather than 41, persons were eventually given inventory notices has no bearing at all on whether or not the procedures authorized by Title III should be employed. Thus, *Giordano* and *Chavez* teach that a failure to comply with the inventory requirements is not a defect warranting suppression under 2518(10)(a)(i), even supposing the statutory language could properly be ignored in order to make it encompass irregularities in post-intercept procedures.[40]

Similarly, the failure to name in the application and order all those likely to be overheard in incriminating conversations does not affect the decision whether to authorize the interception. As noted above, that decision turns on whether there is probable cause to believe the target will be overheard engaging in incriminating conversations over the monitored telephone, and whether other investigative procedures are ineffective. The fact that the incriminating conversations of others may also be overheard is simply not relevant to that decision (see *supra*, note 31).[41] The failure to name suspected co-conspirators thus does not invalidate the interception order and render the interceptions of communications pursuant to it "unlawful" within the meaning of 2518(10)(a)(i).

The soundness of this analysis is further supported by the fact that, as in *Chavez*, *supra*, 416 U.S. at 578, there is no legislative history to suggest that the in-

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[40] The result might arguably be different if the intercepting agents knew before the interception that no inventory would be served. Such knowledge might affect the way in which the interception was conducted and thus bring the violation within a broad reading of the *Giordano* rationale. See *United States* v. *Eastman*, 465 F. 2d 1057 (C.A. 3).

[41] It cannot reasonably be argued that disclosure of additional names would tend significantly to limit the use of interceptions due to a judicial desire to protect the privacy interests of those suspected of complicity; innocent users, whose privacy the judge might properly be inclined to protect, would not be named in any event.

ventory or naming requirements "were meant, by themselves, to occupy a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance." Instead, as we have noted above, the legislative history indicates that the naming requirement was something of an afterthought and was not intended to operate as required by the court below; and the requirement that the government provide the judge with a complete list of persons overheard is not even explicitly included in the statute. The legislative history of the statutory provisions from which these requirements were derived by the court below is sparse; it surely fails to indicate that they played an important role in the statutory scheme (see, *supra*, pp. 24-25, 43-44).

B. There Is No Reason To Apply A Judicially Created Exclusionary Rule Here

The statute defines explicitly the situations in which suppression is an available remedy (18 U.S.C. 2518(10)) and provides that otherwise evidence obtained pursuant to an authorized electronic surveillance shall be admissible at trial, 18 U.S.C. 2517 (3).[42] We submit, therefore, that the statutory suppression provisions are exclusive, and it is accordingly inappropriate, at least in the absence of a constitutional violation, for the courts to order suppression in situations in which it is not authorized by

[42] See also 18 U.S.C. 3501(a), providing that a confession, defined as including any self-incriminating statement, "shall be admissible in evidence if it is voluntarily given."

the statute. In any event, the procedural errors identified by the courts below do not warrant suppression under the standards of the judicially created exclusionary rule, since no substantial rights of respondents were affected, and suppression would have no useful deterrent effect.

1. There is no suggestion that there was insufficient probable cause to authorize the interception here, that other investigative techniques would have sufficed, or that the conduct of the interception was in any way improper. Thus, it is undisputed that the interception of the conversations of those named in the order, and of those whom there was no probable cause to suspect of complicity, was proper at the time it occurred. In these circumstances, even assuming that additional persons should have been identified in the application and order or served with an inventory, the failure to do so affected no substantial rights.[43]

[43] Other courts of appeals have refused to suppress for errors of the types involved here, in the absence of any showing of prejudice. See *United States* v. *Doolittle, supra* (identification); *United States* v. *Civella, supra* (same); *United States* v. *Bohn*, 508 F. 2d 1145, 1148 (C.A. 8), certiorari denied, 421 U.S. 947 (inventory notice); *United States* v. *Iannelli*, 477 F. 2d 999, 1003 (C.A. 3), affirmed on other grounds, 420 U.S. 770 (same); *United States* v. *Wolk*, 466 F. 2d 1143, 1145-1146 (C.A. 8) (same). Cf. *United States* v. *Smith*, 463 F. 2d 710, 711 (C.A. 10) (same); *United States* v. *Rizzo*, 492 F. 2d 443, 447 (C.A. 2) (same). See also *American Bar Association Project on Standards for Criminal Justice, Standards Relating to Electronic Surveillance*, Commentary, p. 160 (Approved Draft, 1971) ("A failure to * * * file

In this case, all the suppressed conversations of Donovan, Robbins, and Buzzacco were with a named target or a person unknown when the application was filed and the order issued. Therefore, the monitoring agents had a clear right under the order to overhear the conversations, and the intercepted conversations were admissible in evidence against the other parties. If the interception had been made with the named target's permission, respondents could not have complained (18 U.S.C. 2511(2)(d); *United States* v. *White*, 401 U.S. 745; *Hoffa* v. *United States*, 385 U.S. 293). The fact that the interception was authorized by a district court, rather than by the target's personal consent, surely should give respondents no greater right to complain. Nor is there any claim here that the failure to name respondents led to the non-disclosure of any information concerning past surveillance of them, even assuming that such evidence might have been relevant to the issuing judge (but see *supra*, n.31).[44] Finally, all three received inventory notices, even though they had not been named. See *United States* v. *Civella*, *supra*, slip op. 18-19.

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the inventory * * * should result in the suppression of evidence only where prejudice is shown"). But see *United States* v. *Civella*, *supra*, slip op. 23, in which the failure to serve inventory notices was held to warrant suppression without consideration of whether prejudice resulted therefrom.

[44] The possibility that a future intercept application may be granted because they were not identified here seems too speculative to be considered a substantial interest warranting suppression now.

Nor did respondents Merlo and Lauer, who received no inventory notices, suffer any impairment of substantial rights. First, as the dissenting judge observed, it "challenges credulity" to conclude that they received no actual notice that their conversations had been intercepted, when inventories were served on 37 of their confederates in February 1973, shortly after the FBI had executed a search warrant on the apartment used by Merlo and Lauer in their bookmaking operations and seized evidence of gambling (Pet. App. 18a-19a, 25a). But even if they received no actual notice until the intercept papers were made available to all the defendants in November 1973, or even, as they allege, until December 1973, this was evidently time enough to permit them to file pretrial motions challenging the sufficiency of the intercept procedures and to prepare for the trial, which has not yet been held.[45]

2. No useful deterrent purpose would be served by suppression here.

As this Court noted in *Michigan* v. *Tucker*, 417 U.S. 433, 447:

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[45] In any event, the primary statutory protection against surprise at trial is 18 U.S.C. 2518(9), which requires that defendants must receive a copy of the order and application 10 days before evidence derived from an intercept is introduced against them. See S. Rep. No. 1097, *supra*, at pp. 105-106. Congress in that Section explicitly made such notice a condition of the admissibility of the evidence. Congress could have similarly made the service of an inventory a condition of admissibility. Since it did not do so, it is inappropriate to add such a requirement by judicial construction.

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

See also *United States* v. *Peltier*, 422 U.S. 531, 542.

Neither of the defects identified by the court below resulted from willful, or even negligent, conduct on the part of the investigating officers. Instead, in both instances, the officials acted in complete good faith.

The failure to identify respondents Donovan, Robbins and Buzzacco in the application for the intercept order reflected at most an error of judgment by an investigating agent in a complex and fast moving investigation. In our petition for a writ of certiorari in *United States* v. *Karathanos*, No. 75-1402, we suggest that suppression is not an appropriate means of controlling the magistrate's exercise of judgment in issuing a warrant. Similarly, it is an excessive sanction to apply to correct the investigating agent's judgment about matters to be included in an interception application that are tangential to its main purpose. Although the possibility of suppression if a court eventually disagrees with the agent's judgment can be expected to affect the way in which those

judgments are made—here, by pursuing a policy of overinclusion in selecting persons to be named in the order—that effect may not be salutory (see pp. 31-32, *supra*).

The failure to include respondents Merlo and Lauer in the lists of names of those overheard provided to the issuing judge was an error of the kind that will occasionally occur in the course of a complex investigation; suppression will not deter such non-intentional oversights.[46] It is, in fact, considerably less serious than failure to comply with the requirements of Fed. R. Crim. P. 41(d) that the person at the premises searched pursuant to a conventional search warrant must receive a copy of the warrant and a receipt for property taken, or that the magistrate must receive a return and inventory. It is settled that such failures do not affect the validity of the search and seizure. *United States* v. *Dudek*, 530 F. 2d 684, (C.A. 6); *United States* v. *Hall*, 505 F. 2d 961 (C.A. 3), and cases cited therein; *United States* v. *Harrington*, 504 F. 2d 130, 134 (C.A. 7); *United States* v. *McKenzie*, 446 F. 2d 949, 954 (C.A. 6); *Evans* v. *United States*, 242 F. 2d 534 (C.A. 6), certiorari denied, 353 U.S. 976. Similarly, here, the failure to notify the issuing judge that two additional persons had been heard, so that he could direct service of an inventory on them,

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[46] As the dissent below notes (Pet. App. 24a), the fact that the government filed a corrected inventory list "is a strong indication that the government was not indifferent to its obligations" in regard to inventories.

should not affect the validity of the interception or warrant suppression of the evidence derived therefrom.

In sum, even assuming that the court below was correct in holding that the government should have identified additional people in the application and in the inventory lists provided to the issuing judge, these failures do not merit suppression of the evidence against them obtained in the course of otherwise valid interceptions.

CONCLUSION

For the above stated reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 1976.

APPENDIX

The Omnibus Crime Control and Safe Streets Act of 1968, Title III, as amended, 18 U.S.C. 2510-2520, provides in pertinent part:

18 U.S.C. 2510. Definitions.

* * * * *

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

18 U.S.C. 2517. Authorization for disclosure and use of intercepted wire or oral communications.

* * * * *

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

* * * * *

18 U.S.C. 2518. Procedure for interception of wire or oral communications.

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or

affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * * * *

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

* * * * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the appli-

cant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted * * *.

(8) * * * * *

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518 (7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted

communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

* * * * *

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

* * * * *

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